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Supreme Court, U.S.
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In The
Supreme Court of the United States

PRESBYTERIAN CHURCH OF SUDAN, et al.,

Petitioners,

v.

TALISMAN ENERGY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF DAVID J. SCHEFFER, DIRECTOR OF THE CENTER FOR INTERNATIONAL HUMAN RIGHTS, AS AMICUS CURIAE IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

David J. Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law, where he teaches international human rights and criminal law and corporate human rights responsibility. He served as U.S. Ambassador-at-Large for War Crimes Issues (1997-2001) and counsel to the U.S. Permanent Representative to the United Nations (1993-1997). He was deeply engaged in the policy formulation, negotiations, and drafting of the constitutional documents governing the International Criminal Court. He led the U.S. delegation that negotiated the Rome Statute (Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90 (1998)), and its supplemental documents from 1997 to 2001. He was deputy head of the delegation from 1995 to 1997. On behalf of the U.S. Government, he negotiated the statutes of and coordinated support for the International Criminal Tribunals for the Former Yugoslavia and Rwanda, Special Court for Sierra Leone, and Extraordinary Chambers in the Courts of

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of my intention to file this amicus brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, made a monetary contribution to the preparation or submission of this brief.

Cambodia. He exercised responsibility within the U.S. Government for the investigation and prosecution of atrocity crimes (namely, genocide, crimes against humanity, and war crimes) on a global basis. He has written extensively about the tribunals, including the International Criminal Court, and the negotiations leading to their creation.

Ambassador Scheffer submits this brief out of concern that the Second Circuit erred in its analysis of the Rome Statute's mens rea provision for aiding and abetting liability, most particularly in the Second Circuit's conclusions that this provision of the Rome Statute was meant to reflect customary international law and that the accessorial liability of aiding and abetting arises only when there is shared intent with the perpetrator of the underlying crime. Neither conclusion is correct. Ambassador Scheffer believes this brief is necessary to clarify the meaning of the Rome Statute and aiding and abetting liability thereunder. The Second Circuit judgment reflects serious misunderstandings of the Rome Statute and it merits review by this Court.

SUMMARY OF ARGUMENT

The Second Circuit errs in drawing upon Article 25(3)(c) of the Rome Statute of the International Criminal Court as a demonstration of customary international law for aiding and abetting atrocity

crimes under the Court's subject matter jurisdiction. Article 25(3)(c) reads:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . . .
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission. . . .

This provision was a negotiated compromise among mostly common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law.

The Rome Statute was never intended, in its entirety, to reflect customary international law. Some of the document's provisions – particularly those pertaining to the subject matter jurisdiction of the International Criminal Court – were negotiated for the purpose of codifying customary international law. However, many provisions were not so negotiated and clearly embody compromises unique to the treaty and to the operation of the International Criminal Court. Indeed, aiding and abetting liability remained an unresolved issue until very late in the negotiations. The final wording of Article 25(3)(c) is an example of compromise language far removed from any effort to mirror customary international law.

The Second Circuit further errs in concluding that the reference to "purpose" in Article 25(3)(c) of the Rome Statute establishes the requirement of a shared intent between the perpetrator of the crime and the aider or abettor. The negotiating history of Article 25(3)(c) demonstrates that there was no definitive agreement pointing to either an intention standard or a knowledge standard with respect to aiding and abetting liability. The compromise "purpose" language chosen for Article 25(3)(c) reflects the obvious point that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but the aider or abettor's intention cannot be established without reference to the mens rea principles set forth in Article 30 of the Rome Statute.[2] Since the judges of the International

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[2] Article 30 of the Rome Statute reads in its entirety:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> > (a) In relation to conduct, that person means to engage in the conduct;
> >
> > (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Criminal Court have had no occasion yet to interpret Article 25(3)(c), particularly in conjunction with Article 30, there is no judicial precedent from which to gain a definitive understanding by anyone of aiding and abetting liability under the Rome Statute. As it now stands, however, the Rome Statute can be reasonably construed as establishing, for purposes of cases before the International Criminal Court, a knowledge standard for aiding and abetting liability.

This Court should grant certiorari in order to examine whether the mens rea standard for aiding and abetting under the Alien Tort Statute (28 U.S.C. § 1350) should be determined by reference to Article 25(3)(c) of the Rome Statute, which represents a negotiated formula uniquely crafted for the International Criminal Court, or whether it should be ascertained from an examination of customary international law, which has long applied the knowledge standard.

ARGUMENT

I. ARTICLE 25(3)(c) OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT DOES NOT REFLECT CUSTOMARY INTERNATIONAL LAW

The Second Circuit holds that the mens rea standard for aiding and abetting liability under the Alien Tort Statute must be a "norm of international character accepted by the civilized world and defined

with a specificity comparable to the features of the 18th-century paradigms" recognized by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004). Curiously, the Second Circuit looks to the Rome Statute of the International Criminal Court for definitive guidance by interpreting it as both adopting the purpose standard and embodying the customary international law standard of *Sosa* with respect to aiding and abetting liability. *The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc.*, 582 F.3d 244, 258-259 (2d Cir. 2009). The Second Circuit errs on all counts with these findings. Petitioners correctly point out that customary international law has long established a knowledge standard for aiding and abetting liability and that federal common law, which is informed by customary international law, should guide the courts in determining accessorial liability under the Alien Tort Statute. Petition for Writ of Certiorari, The Presbyterian Church of Sudan et al. v. Talisman Energy, Inc., No. 09-1262 at 19-26 (2d Cir. April 15, 2010).

While fully embracing such reasoning, this amicus brief explicates two narrow but essential points not fully addressed elsewhere. The first objective is to explain, in this Part I, why Article 25(3)(c) of the Rome Statute, which the Second Circuit relies upon for its finding of a purpose standard, should not be interpreted as customary international law. Nonetheless, even if the provision were to be firmly settled as customary international law in the view of the federal judiciary, the second objective of

this amicus brief is to explain, in Part II, how the Second Circuit's interpretation of the wording of Article 25(3)(c) betrays both what transpired in the negotiations leading to the Rome Statute and how the mens rea standard for aiding and abetting is established under the treaty.

The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the International Criminal Court. The Rome Statute was never intended, in its entirety, to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization and they do not include Article 25(3)(c). Nonetheless, the Second Circuit leaps to the conclusion that Article 25(3)(c) embodies customary international law.

Article 25(3)(c) was a negotiated compromise among primarily common law and civil law governments after years of talks leading to the Rome Statute and was not finalized to express a rule of customary law. There is no international consensus reflected in Article 25(3)(c), which in any event must be read in conjunction with Article 30, the mens rea provision of the Rome Statute.

A. The substantive crimes within the jurisdiction of the International Criminal Court were drafted to reflect customary international law

The provisions of the Rome Statute that the drafters understood were being negotiated to record

customary international law were the atrocity crimes defined in Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) of the treaty – the very provisions federal courts should be looking to for guidance about the *primary* violations of international law at stake in Alien Tort Statute litigation. *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 103 (3d ed. 2007).

For years the drafters, including myself and a team of State, Defense, and Justice Department lawyers working with our foreign counterparts, examined and debated the development of international humanitarian law and international criminal law to arrive at a general agreement as to what constituted customary international law for the substantive crimes that would be prosecuted before the International Criminal Court. Thus, if one applies the stringent universality requirements of *Sosa* to the Rome Statute, one can confidently identify the atrocity crimes defined therein as representing the types of crimes (or torts) that have universal character and are of such a magnitude that they fall within the jurisdictional scope of the Alien Tort Statute. But that sharp focus on customary international law never was the aim of the negotiations regarding *other* provisions of the Rome Statute, including the negotiations on accessorial liability. While some other articles of the Rome Statute happened, in the end, to reflect customary international law, Article 25(3)(c) is *not* one of them.

B. The general principles of law and other key provisions of the Rome Statute were not all drafted to reflect customary international law

The general principles of criminal law set forth in Articles 22-33 of the Rome Statute were intensively negotiated, often leading to compromises between common law and civil (Romano-Germanic) law countries in particular and with the active intervention of delegations schooled in *Sharia* law or other major legal systems. In some instances, the end product of this process of negotiation was a provision that mirrors customary international law. For example, the provisions of the Rome Statute that doubtless fall within this category include Articles 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 24 (*non-retroactivity ratione personae*), 25(3)(e) (incitement to commit genocide), 32 (mistake of fact or mistake of law), and 67 (rights of the accused).

It would be erroneous to claim, however, following the deals struck and compromises arrived at during years of talks, that all of the provisions on general principles of law and all rules of evidence and procedure, penalties, and sentencing were reflections of customary international law – many were not. As explained above, negotiators labored very hard to create a subject matter jurisdiction of only crimes of customary international law, but the Rome Statute never would have come to pass if that standard of universal acceptance had been required for other

provisions, including all of the general principles of law.

For example, Article 33, a general principle of law on superior orders and prescription of law, was heavily negotiated, resulting in compromise language that does not mirror comparable provisions in the charters of the Nuremberg and Tokyo International Military Tribunals or the statutes of the other international or hybrid criminal tribunals of recent years. Indeed, the end result in Rome reflected more what was acceptable to NATO military commanders than what was desired by many other governments. The former President of the International Criminal Tribunal for the Former Yugoslavia, Professor Antonio Cassese, writes, "[Article 33] is at odds with customary international law, for it does not include *war crimes* in the category of offences with regard to which superior order [sic] enjoining their commission are always manifestly unlawful." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 279 (2d ed. 2008).

Beyond the general principles of law, another example of negotiated compromise language arises with Article 77, which establishes a maximum sentence of life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Arab and Caribbean delegations strongly objected to the absence of the death penalty in the Rome Statute and would never concede that Article 77 reflects the maximum degree of punishment permitted under customary international law. WILLIAM A. SCHABAS, AN

INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 316 n. 17 (3d ed. 2007). Indeed, the U.S. Government would not concede that point.

C. Article 25(3)(c) of the Rome Statute was not drafted to reflect customary international law

Similarly, Article 25(3)(c) of the Rome Statute was negotiated not to codify customary international law but to accommodate the numerous views of common law and civil law experts about how, precisely, to express the mens rea of the aider or abettor. Per Saland, the Swedish Chairman of the Working Group on the General Principles of Criminal Law for years prior to and throughout the Rome Conference, writes that Article 25

> posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content. . . . The text was also burdened with references to the mental element (e.g., intent and knowledge) because agreement had not yet been reached as to the text of a separate article dealing with the mental element in general terms.

Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 198 (Roy Lee ed., 1999).

As the lead U.S. negotiator, I do not recall hearing directly or being advised by my Justice Department team of negotiators of a single discussion prior to or during the Rome negotiations where the text of what laboriously became Article 25(3)(c) on aiding and abetting as a mode of participation was being settled as a matter of customary international law. It was a very contentious provision, with some delegations seeking explicit reference to intention, notwithstanding the important complication that the word "intention" has different meanings in different legal systems. In some countries, for example, passive intention is inferred from an actor's engaging in conduct with knowledge of some likely consequence of that conduct. Other delegations were wedded to the term "knowledge," believing that it better reflected the standard that was employed in their national practice and that had been endorsed in the jurisprudence of the Nuremberg and Tokyo International Military Tribunals and of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.

Negotiators struggled to find compromise wording and ultimately settled on using neither "intent" nor "knowledge" but "purpose." Reaching this compromise was made easier, in the end, by the prior resolution of the final language of Article 30, an article that deals expressly with the issue of the mental element of crimes. Finalizing the language of

Article 30 helped enormously, as it enabled negotiators to look to Article 30 for intent and knowledge standards while seeking an accommodation for Article 25(3)(c). However, if anyone had claimed we were writing customary international law on aiding and abetting liability in Article 25(3)(c), they would have been laughed out of the room.

Thus, the wording of Article 25(3)(c) was uniquely crafted for the International Criminal Court, and when read in conjunction with the mens rea standards set forth in Article 30 of the Rome Statute, leaves to the judges of the International Criminal Court the task of determining precisely the proper criteria for accessorial liability. Nothing discourages or prevents them from looking to the growing jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, to state practice, and to scholarly texts for guidance on this issue.

Article 25(3)(c) is not a statement of customary international law. Since the International Criminal Court has yet to interpret the provision's meaning and application with respect to accessorial liability for aiding and abetting, national courts can only speculate as to its scope and meaning; yet that speculation should be fully informed by the negotiating history. One pillar of certainty in that history is that Article 25(3)(c) has no standing as customary international law.

II. THE MENS REA REQUIREMENT FOR AIDING AND ABETTING UNDER THE ROME STATUTE IS AMBIGUOUS BUT CAN BE REASONABLY INTERPRETED AS A KNOWLEDGE STANDARD

In the years following the Rome Statute negotiations, scholars have debated what Article 25(3)(c) of the Rome Statute achieves – whether the provision creates a shared purpose requirement for aiding and abetting or whether, when joined with the mental element provision of Article 30, it builds upon long-standing and growing precedents from international and hybrid criminal tribunals that sustain the knowledge standard for aiding and abetting. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 74, 214-29 (2d ed. 2008); Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 301-03 (2001); Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 854-55 (Otto Trifftrer ed., 2d ed. 2008); Kai Ambos, *Article 25: Individual Criminal Responsibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 743, 759-60 (Otto Trifftrer ed., 2d ed. 2008); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 213 (3d ed. 2007); WILLIAM A. SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435-46 (2010); Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). Such debate demonstrates that there are reasonable interpretations, one of them certainly being application of the knowledge standard. But until the judges of the International Criminal Court rule on the mens rea requirement for aiding and abetting under the Rome Statute, no national court can dictate that one standard (such as purpose or shared intention) negates a second standard (such as knowledge) in the International Criminal Court's constitutional framework or in its practice.

A. Article 25(3)(c) is reasonably read with a knowledge standard because imposition of an intent standard would destroy the distinction between aider or abettor and co-perpetrator

The great weight of international precedent has identified aiding and abetting with a knowledge standard. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 211, 214-18 (2d ed. 2008); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 234-35, 245 (Dec. 10, 1998); Brief for International Law Scholars William Aceves et al. as Amici Curiae Supporting Petitioners at 12-15, Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., No. 09-1262 (2d Cir. April 30, 2010). The Second Circuit nevertheless reached a contrary conclusion: "Thus, applying international law, we hold that the mens rea

standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Presbyterian Church of Sudan, et al.*, 582 F.3d at 259.

Among the problems with this conclusion is that it obliterates the distinction between aiders and abettors, on the one hand, and perpetrators of atrocity crimes on the other hand. The character of atrocity crimes, which are massive assaults on civilian populations or egregious violations of the laws of war, means that: 1) the intention of the perpetrator can often be inferred more readily; and 2) the many additional participants in the vast criminal enterprise necessarily act with a multiplicity of intentions among them, but the aiders and abettors do so only knowing that their participation facilitates the intentional commission of the principal crime while they act upon their separate individual intentions, such as the pursuit of profit, survival, status, or even discrimination against the victims.

Professor William Schabas explains, "Some judgments [of the war crimes tribunals] have attempted to explain the distinction [between aiding and abetting and perpetration] in another way, stating that when the accomplice 'shares' the intent of the principal perpetrator, he or she becomes a 'co-perpetrator.'" WILLIAM A. SCHABAS, THE U.N. INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 307-08 (2006). Had the drafters of the Rome Statute meant to require an intent standard for aiding and abetting, they would have agreed to recast aiding and abetting more coherently as a co-perpetrator

mode of liability. But they did not. Consequently, a national court would be mistaken to identify the Rome Statute as somehow confirming a shared intention standard and denying the knowledge standard. The final wording of Article 25(3)(c) negated neither the large body of precedents for a knowledge standard in aiding and abetting liability nor the common sense reality of how atrocity crimes are committed.

B. Article 25(3)(c) must be interpreted together with the general principle of law on mental element set forth in Article 30(2)(b) of the Rome Statute

Negotiators repeatedly stumbled over what eventually was consolidated in Article 30 of the Rome Statute regarding the required mental element for all of the atrocity crimes, including the mental element for accessorial liability for such crimes. There remained a lingering and significant problem prior to Rome among largely common law and civil law delegations about precisely how the mens rea for aiding and abetting should be worded. The Preparatory Committee draft in spring 1998, which was the initial working draft in Rome, reflected this continued indecision with its draft language for the aiding and abetting provision: "[With [intent] [knowledge] to facilitate the commission of such a crime,] aids, abets or otherwise assists . . . " *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June –*

17 July 1998, Official Records, Volume III, U.N. Doc. A/CONF.183/13 (Vol. III) (2002), at 31.

It was only after negotiators reached Rome in the summer of 1998 that they finally arrived at compromise language. We knew that Article 30 of the Rome Statute, which deals with the required mental element, would be the agreed formula for how both intent and knowledge would be described and applied as the mental element for criminal acts, "[u]nless otherwise provided." Rome Statute, art. 30(1). The latter proviso relates to explicit formulations of intent and knowledge for some of the atrocity crimes defined in Articles 6, 7, and 8, for command responsibility under Article 28, and for participants in a "common purpose" under Article 25(3)(d)(ii). WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 224-25 (3d ed. 2007). But the proviso's relevance, if any, to Article 25(3)(c) is far from clear and was never confirmed in the negotiations.

The final text of Article 30(2)(b) easily captures the mens rea requirement for aiding and abetting, namely, "[i]n relation to a consequence, that person means to cause that consequence *or* is aware that it will occur in the ordinary course of events." (emphasis added). At Rome, negotiators did not relegate aiding and abetting to the first prong of this formulation – "means to cause that consequence" – which would have injected a shared intention standard into aiding and abetting. Rather, the intent of the aider or abettor is logically discovered within the awareness of the "consequence," namely that he or she who aids or

abets is someone who "is aware that [the consequence] will occur in the ordinary course of events." Rome Statute, art. 30(2)(b).

Article 25(3)(c)'s opening phrase, "For the purpose of facilitating the commission of such a crime," was agreed to in Rome during the final negotiations as an acceptable compromise phrase to resolve the inconclusive talks over whether to use the word "intent" or the word "knowledge" for this particular mode of participation. The "purpose" language stated the de minimus and obvious point, namely, that an aider or abettor purposely acts in a manner that has the consequence of facilitating the commission of a crime, but one must look to Article 30(2)(b) for guidance on how to frame the intent of the aider or abettor with respect to that consequence.

Donald Piragoff, lead Canadian Government negotiator on general principles of law throughout the years of negotiations culminating in Rome, writes about the relationship between aiding and abetting liability under Article 25(3)(c) and mental element requirements of Article 30(2):

> A question arises as to whether the conjunctive formulation [intent and knowledge] changes existing international jurisprudence that an accomplice (such as an aider or abettor) need not share the same *mens rea* of the principal, and that a knowing participation in the commission of an offence or awareness of the act of participation coupled with a conscious decision to participate is

> sufficient mental culpability for an accomplice. It is submitted that the conjunctive formulation has not altered this jurisprudence, but merely reflects the fact that aiding and abetting by an accused requires both knowledge of the crime being committed by the principal and some intentional conduct by the accused that constitutes the participation. . . . Article 30 para. 2(b) makes it clear that "intent" may be satisfied by an awareness that a consequence will occur in the ordinary course of events. This same type of awareness can also satisfy the mental element of "knowledge," as defined in article 30, para. 3. Therefore, if both "intent" and "knowledge" are required on the part of an accomplice, these mental elements can be satisfied by such awareness.

Donald K. Piragoff & Darryl Robinson, *Article 30: Mental Element*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 849, 855 (Otto Trifftrer ed., 2d ed. 2008).

There has been no ruling by the judges of the International Criminal Court on whether the "purpose" language in Article 25(3)(c) constitutes a form of specific intent, whereby evidence of a particular intention must be demonstrated and the mental element of Article 30(2)(a) or the first prong of Article 30(2)(b) ("that person means to cause that consequence") *must* be applied. For the present, the compromise struck in Article 25(3)(c) reflects the

ambiguity that uniquely characterizes the Rome Statute on aiding and abetting liability.

C. The "purpose" requirement was not added to Article 25(3)(c) during the Rome negotiations to require a shared intention by the aider or abettor and the perpetrator of the crime

The Second Circuit equates the "purpose to facilitate" requirement in Article 25(3)(c) with the perpetrator's intent to commit the crime, thus marrying the perpetrator's intent with that of the aider or abettor as a virtual co-perpetrator. That is a mistaken reading of the provision.

Professor William Schabas writes, "The purpose requirement was added during the Rome Conference, but nothing in the official records provides any clarification for the purposes of interpretation." WILLIAM SCHABAS, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 435 (2010). When the intention of the principal perpetrator is known to the aider or abettor, who nonetheless proceeds to assist such perpetrator in the commission of the principal crime, then aiding and abetting liability logically arises. This is so even though the aider or abettor acts with a different intention, which may be an intent that on its face is perfectly legal (such as seeking to profit from a business enterprise).

The most generous interpretation one can afford Article 25(3)(c) is that it connotes an inferred intent

from the act of providing assistance that one knows is facilitating the commission of a crime. That one can infer intent from knowledge is well established. For example, in the context of the Alien Tort Statute, while making a profit may be a corporation's primary objective, a secondary objective can arise in the realization that one's actions facilitate the commission of the crime and such knowledge can give rise to an inferred intent to *join* in the criminal conduct because it is profitable. In some cases – probably rare – a corporation may actually come to embrace not only its primary objective of making a profit, but also the criminal purpose of the perpetrator. But when that additional objective is fully embraced, it transforms the criminal character of the corporation from that of an aider or abettor into that of a full co-perpetrator of the crime. *See infra* at 15-17.

A small group of European scholars – with whom the Second Circuit seemingly aligns itself – seeks to impose a far-reaching and provocative interpretation on Article 25(3)(c), setting aside precedent and favoring a narrow interpretation that attaches to the defendant aider or abettor an intention to join the perpetrator in the commission of the underlying crime. *See* Albin Eser, *Individual Criminal Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, 767, 798-801, 900-02 (Antonio Cassese, et al. eds., 2002). Such a view, at the heart of the debate in Rome, would lead one to believe that the Rome Statute definitively establishes a whole new playing field for aiding and abetting

that, at a minimum, would have to be uniquely tailored for the International Criminal Court and far removed from any claim of customary international law.

The Second Circuit succumbs to the notion that insertion of the word "purpose" in Article 25(3)(c) must really mean a purpose or shared intent standard for aiding and abetting, when in reality the phrase "purpose to facilitate" was a compromise usage of those words to avoid any agreement on precisely the issue of shared intent. In Rome there was no agreement to so limit aiding and abetting to such a narrow range of liability requiring the finding of a shared intent to commit the underlying crime. That theory may exist in the aspirations of certain academics determined to declare victory ex post facto at Rome, but it has no reality in either the Rome Statute or the Alien Tort Statute.

Professor Roger Clark, a principal negotiator advising Samoa before and during the Rome Conference, writes:

> Article 25 sometimes uses terms like "purpose" and "with the aim of" that may need to be read in the light of article 30. Speaking generally, one who does not personally "do" the deed, must know of it and intend to associate himself with it. . . . There was considerable debate throughout the process about the conjunctive "and" between intent and knowledge [in Article 30]. Some delegations, the French in particular, insisted

> that both were necessary. Others of us, especially from common law jurisdictions, believed that the appropriate mental element for each separate material element had to be considered on its own merits. Particularly for circumstance elements, as the term "circumstance" is used in article 30(3) (and some consequence ones), knowledge (in the sense of awareness) might well be enough, although intent might be required as to other relevant elements. The debate shed more heat than light. In part, the differences of perspective coincided with the ease with which some of us are prepared to see several different material elements combining with appropriate mental elements (plural) to form "the offence," where others tend to see the material element, a global "thing," and a single intent/knowledge mental element which gets attached to that thing.

Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 2 CRIM. L.F. 291, 302-303 (2001). Only the judges of the International Criminal Court will sort this out when faced with a real case.

I believe, however, that when Article 25(3)(c) is interpreted by the judges of the International Criminal Court, they are more likely to discover the standard for aiding and abetting as it has developed in the jurisprudence of the international military tribunals at Nuremberg and Tokyo and the international

and hybrid criminal tribunals or recent years, in state practice, and in the writings of leading scholars: a knowledge standard of substantial assistance and an intent standard arising from awareness that the criminal consequence will occur in the ordinary course of events. A fair reading of Articles 25(3)(c), 30(2)(b), and 30(3) of the Rome Statute achieves such a standard.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONFIRM THAT LOWER COURTS CANNOT RELY UPON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT FOR A RULE OF CUSTOMARY INTERNATIONAL LAW ON AIDING AND ABETTING LIABILITY

The ambiguity that burdens the meaning of aiding and abetting liability under Article 25(3)(c) of the Rome Statute one day will be replaced with clarity, but only by the judges of the International Criminal Court when they deliberate on a relevant case. Even then their ruling will not necessarily be formulated to reflect customary international law. Neither the Second Circuit nor this Court can substitute itself for their judgment about the Rome Statute's meaning. Scholars only can speculate at this stage. What can be stated with certainty is that Article 25(3)(c) was a negotiated compromise during the Rome negotiations that achieved the utilitarian objective of ensuring that aiding and abetting liability can be prosecuted before the International Criminal

Court, and that the provision was uniquely crafted for the Court and thus never negotiated as a rule of customary international law.

While the subject matter jurisdiction provisions of the Rome Statute offer a valuable resource for the federal courts in their determination of what violations of international law under the Alien Tort Statute meet this Court's standard set in *Sosa*, an examination of accessorial liability standards for aiding and abetting under the Rome Statute offers no such guidance. This Court would seriously misread the Rome Statute to award Article 25(3)(c) of the Rome Statute with the weighty significance of customary international law when the facts so clearly challenge that finding. Only the most self-inflated negotiators at Rome would hope for such a prize in the aftermath.

CONCLUSION

As a long-time participant in the American struggle over the merits and risks of the International Criminal Court, I find it ironic that the Second Circuit relies upon a mistaken reading of the Rome Statute to ascertain aiding and abetting liability. The United States has not ratified the Rome Statute because of continuing opposition from some quarters to its purported jurisdictional reach and even, in some respects, to its divergence from customary international law. Many of these critics no doubt would be

surprised to learn that a federal court is relying heavily on the unratified Rome Statute for guidance on a form of accessorial liability – aiding and abetting – so easily and correctly found within the federal common law. Even the *Sosa* standard, which focuses on determining the *primary* violations of international law that should qualify for Alien Tort Statute litigation, does not purport to abandon federal common law, which itself is informed by customary international law, with respect to *secondary*, or accessorial, liability standards.

For the above reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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